RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,

Respondents.

On Writ of Certiorari to the Court of Appeal of California, First Appellate District

BRIEF FOR BUSINESS ROUNDTABLE AND THE SOCIETY FOR CORPORATE GOVERNANCE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Business Roundtable ("BRT") is an association of chief executive officers of leading U.S. companies that together have more than $6 trillion in annual revenues, employ nearly 15 million people, and pay more than $220 billion in dividends to shareholders each year. BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and should participate in litigation as *amici curiae* where important business interests are at stake.

The Society for Corporate Governance (the "Society") is a professional association of over 3,200 governance professionals who serve approximately 1,600 public, private, and not-for-profit companies of most every size and industry. Its members support the work of corporate boards and executives in connection with corporate governance and disclosure obligations, compliance with corporate and securities laws and regulations, and stock-exchange listing requirements. The Society's mission is to shape corporate governance through education, collaboration, and advocacy, with the ultimate goal of creating long-term shareholder value through better governance.

Both BRT and the Society are intensely aware of the deleterious impact of meritless securities litigation on

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[1] This brief is submitted pursuant to Rule 37 of the Rules of the Supreme Court of the United States. Counsel for petitioners and respondents both have consented to this submission. No counsel for a party authored this brief in whole or in part, nor did any such counsel or anyone other than *amici* make any monetary contribution intended to fund the preparation or submission of this brief.

the management and governance of U.S. public companies and the practical ability of those companies to access the U.S. capital markets or to do so cost effectively. The members of BRT and the Society serve as officers, directors, and governance professionals of companies that regularly raise capital in securities offerings and are subject to the federal securities laws. Together, they offer a unique perspective on why state court jurisdiction over class actions asserting claims under the Securities Act of 1933 (the "1933 Act") undermines protections that Congress enacted to protect against vexatious securities claims and harms the U.S. economy.

SUMMARY OF ARGUMENT

The Private Securities Litigation Reform Act of 1995 (the "Reform Act") and Securities Litigation Uniform Standards Act of 1998 ("SLUSA") together address the intractable problems posed by vexatious class action securities litigation. They do so by channeling securities class actions into federal court, where comprehensive substantive and procedural safeguards apply.

Congress chose a federal forum for securities class actions to ensure fair and efficient adjudication of these claims, with uniform application of congressionally created protections for defendants and absent class members. This fairness, consistency, and uniformity is of critical importance to America's public (and not-yet-public) companies, which—together with their officers and directors—face the prospect of securities class actions whenever their stock prices decline. Honoring Congress's choice of an exclusive federal forum does not impede meritorious securities litigation. It simply ensures that these federal claims are brought in federal court, where they are subject to federal protections that promote efficient and

consistent adjudication, including early dismissal of obviously meritless cases.

The interpretation of SLUSA applied by the California courts in this case would undermine these congressionally mandated protections in a significant subset of federal securities cases: class actions asserting only claims under the 1933 Act, 15 U.S.C. §§ 1 *et seq.* Allowing state courts to exercise jurisdiction over this core category of federal cases would leave an incongruous hole in Congress's comprehensive statutory framework, which otherwise directs both federal and state class actions to federal court and its accompanying procedural safeguards. If accepted, such an interpretation would incentivize plaintiffs' counsel to select those state courts with the most permissive standards for pleading and maintaining class actions and to funnel 1933 Act claims there. This would revive the very evil that SLUSA was enacted to remedy: the proliferation in state court of meritless securities class actions that have value only for settlement purposes. Congress could not have intended this perverse result.

For the reasons set forth in petitioners' brief, the 1933 Act's jurisdictional provisions do not, as a matter of statutory text and construction, permit state court jurisdiction over class actions under the 1933 Act. BRT and the Society submit this *amicus* brief to highlight three additional, important reasons to hold that state courts lack subject matter jurisdiction over "covered class actions" alleging only 1933 Act claims.

First, the circumstances around SLUSA's passage, as well as its legislative history, leave no doubt that Congress intended to subject all securities class action litigation to the protections of the Reform Act in an exclusively federal forum. Moreover, because the original 1933 Act predated the development of the

modern class action by over three decades, the existence of its general provision for concurrent jurisdiction says nothing regarding the proper construction of Congress's enactment of the later, more specific jurisdictional provisions of SLUSA with respect to class actions. Indeed, no one in 1933 could have imagined the way the class action device would evolve or the abuses that Congress later explicitly sought to curb through the Reform Act and SLUSA.

Second, when state courts exercise jurisdiction over 1933 Act class actions, they deprive defendants and absent class members of many meaningful safeguards that Congress enacted to address abusive securities class action litigation. Inconsistent state court standards undermine the well-developed federal scheme that was specifically designed to curb meritless securities class actions, protect absent class members, and shield defendants from the burdens of lawyer-driven class action litigation. State courts inconsistently apply or dispense altogether with mechanisms such as the Reform Act's discovery stay and lead plaintiff selection provisions and the appeal process under Federal Rule of Civil Procedure 23(f). Nor is there any interstate analog to the Multidistrict Litigation Act of 1968, which permits the centralization of multiple proceedings in a single court. Plaintiffs' attorneys can and do take advantage of this lack of uniformity by searching out the most permissive fora in which to file 1933 Act class actions, duplicating proceedings and thus magnifying the cost to litigants, and exposing parties to the risk of contradictory legal rulings.

Third, uncertain and inconsistent application of the Reform Act's and SLUSA's protections directly harms securities issuers, as well as their officers and directors—who are almost always named as

defendants in 1933 Act class actions. It also harms the U.S. economy as a whole. Doubts that securities class actions will be handled pursuant to uniform federal standards discourage issuers from offering securities. By subjecting corporate issuers, officers, and directors to a patchwork of divergent laws and regulations, state securities class actions inappropriately increase litigation risk and costs. Those costs are ultimately borne by investors and shareholders.

BRT and the Society, together with their members, have first-hand experience with the negative effects and distraction that meritless securities class actions—particularly those filed in state court—can have on companies seeking to access the capital markets, as well as their senior executives and board members. This brief details the real costs of these harms to public companies, both directly and indirectly through loss of director and officer time and attention on meritless cases. Congress unequivocally held out the promise, through the Reform Act and SLUSA, that uniform federal procedures—consistently applied in an exclusively federal forum—would curtail, if not eliminate, these costs through pre-discovery dismissal of meritless claims and non-duplicative pretrial litigation in a single court. The statutory construction advanced by the California courts below and by respondents in this Court imperils this promise, contravening Congress's clear intent. This Court should accordingly reject that interpretation and hold, as petitioners demonstrate in their brief, that SLUSA revoked state court jurisdiction over class actions solely asserting 1933 Act claims.

ARGUMENT

I. Congress Intended for Federal Securities Class Actions to Be Heard in Federal Court

The Reform Act was enacted to curb abuses in the filing of meritless class action securities cases, and SLUSA was enacted to prevent plaintiffs' counsel from bringing securities class actions in state court to evade the Reform Act's more stringent requirements. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82 (2006) (citing H.R. Rep. No. 105-640, at 10 (1998); S. Rep. No. 105-182, at 3–4 (1998)). At the time of SLUSA's enactment, securities class action litigation had begun to shift from federal to state courts, which were applying diverse substantive and procedural standards in adjudicating those cases. Congress responded by enacting SLUSA to provide an exclusive federal forum for securities class actions.

A. Securities Class Actions Imposed Significant Costs Prior to the Reform Act and SLUSA

Securities class action litigation is particularly susceptible to abuse. The expense and burden of discovery and the threat of astronomical damages can cause substantial harm to companies, officers, and directors, even in the most meritless of cases. *See, e.g.*, John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 574 (2010).

A significant upsurge in meritless federal securities class actions by the 1990s highlighted the need for reform. *See, e.g.*, Barbara Moses & Rachel K. Jeck, *Securities Litigation Reform: Legislative Initiatives 1993-94*, C977 ALI-ABA 73, 75 (Jan 12, 1995) (noting that federal securities class actions more than doubled

in 1990 compared to rates throughout the 1980s); 141 Cong. Rec. S9,043 (daily ed. June 26, 1995) ("[M]eritless law class actions have skyrocketed.") (statement of Marc E. Lackritz, President, Securities Industry Association (Testimony before the Securities Subcommittee, Senate Banking Committee, March 2, 1995, at 3)).

The rise in securities class action litigation at this time negatively affected the capital markets by imposing a "litigation tax" on public securities issuers (as well as their officers and directors) that made expensive and disruptive litigation an increasingly significant variable in corporate decision making.[2] Richard M. Phillips & Gilbert C. Miller, *The Private Securities Litigation Reform Act of 1995: Rebalancing Litigation Risks and Rewards for Class Action Plaintiffs, Defendants, and Lawyers*, 51 Bus. Law. 1009, 1029 (1996) ("Meritless class actions thus impose a hidden 'litigation tax' . . . that ultimately injures public investors and weakens the U.S. economy."). The securities litigation climate was "adversely affecting capital marketplace decisions: whether companies go public, whether foreign companies seek listings on [U.S.] stock exchanges and NASDAQ, whether voluntary disclosure occurs (and in what form)." *Securities Litigation Reform: Hearings Before the Subcomm. on Telecommunication and Finance of the House Comm. on Energy and Commerce*, 103d Cong., 2d Sess. 34 (1994)

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[2] For example, Congress estimated that, in 1994, corporations or insurance companies paid $1.4 billion to settle securities lawsuits. S. Rep. No. 104-98, at 9 (1995) (citing *COP Targets Shareholder Suits*, Investors Business Daily, February 26, 1995, p. A1). Numerous empirical studies concluded that in the pre-Reform Act period, there was no relationship between settlement value and a claim's merits. *E.g.*, Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991).

(testimony of Donald C. Langevoort, Professor of Law, Vanderbilt University School of Law); *see also* Arthur Levitt, Chairman, U.S. Sec. & Exchange Comm'n, Private Litigation Under the Federal Securities Laws, Address at the Securities Regulation Institute (Jan. 26, 1994) (noting the prevailing view "that the current system imposes substantial costs on issuers"). As the Senate report on the Reform Act explained, "[o]ur economy does not benefit when strike suit artists wreak havoc on our Nation's boardrooms and deter capital formation." S. Rep. No. 104-98, at 10.[3]

The negative aspects of securities class actions in the pre-Reform Act period also harmed shareholders. Because being the first to file a complaint often proved determinative in the selection of a class representative and class counsel, plaintiffs' counsel were incentivized to rush into court without taking sufficient time to locate plaintiffs with the skills and resources to serve as effective class representatives or adequately investigating the claims. H.R. Conf. Rep. No. 104-369, at 32–33 (1995). Commentators at the time observed that "the single most salient characteristic of class and derivative litigation is the existence of 'entrepreneurial' plaintiffs' attorneys [who, b]ecause [they] are not subject to monitoring by their putative clients . . . operate largely according to their own self-interest."

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[3] Congress and commentators also concluded that the costs of meritless securities litigation chilled discussion and disclosure of issuers' future prospects and other "beneficial corporate practices," *see* John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 Bus. Law. 335, 339 (1996), and also discouraged qualified individuals from serving on boards of directors, S. Rep. No. 104-98, at 21. *See also* Part III, *infra*.

Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 7–8 (1991).

B. Congress Enacted the Reform Act to Curb Vexatious Securities Class Actions

In 1995, Congress acted to repair the securities class action system by passing the Reform Act. The Reform Act was Congress's solution to abuses of the "class-action vehicle in litigation involving nationally traded securities." *Dabit*, 547 U.S. at 81. The Reform Act codified a number of procedural and substantive safeguards aimed at reducing abusive filings and protecting class members and defendants from the harmful effects of the existing securities class action environment. *See* Part II, *infra*. The Reform Act did, however, unintentionally leave a significant loophole: plaintiffs could avoid the higher hurdles imposed by the Reform Act by filing securities class actions in state court.

Class action plaintiffs' attorneys immediately seized on this loophole, leading to a proliferation of securities class actions in state court. Prior to the Reform Act, plaintiffs' counsel had initiated "essentially no significant securities class action litigation" in state court. H.R. Rep. No. 105-640, at 10. But in the year following passage of the Reform Act, the Securities and Exchange Commission recognized numerous studies that found a significant increase—*by as much as 64%*—in state court securities class actions and labeled the shift to state court "in an apparent attempt to avoid some of the procedures imposed by the Reform Act" as perhaps "the most significant development in securities litigation post-[Reform Act]." *See* Office of the General Counsel, U.S. Sec. & Exchange Comm'n, Report to the

President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995 at 2 (1997).

C. Congress's Express Purpose in Enacting SLUSA Was to Ensure that Securities Class Actions Proceed Exclusively in Federal Court

Congress quickly recognized that class action filings in state court were undermining the Reform Act. *See Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 (2006). Congress enacted SLUSA specifically to close this loophole and thereby "block this bypass of the Reform Act." *Id.* The underlying purpose of SLUSA's enactment was clear: it sought to further implement the goals of the Reform Act by making sure that federal securities class actions are litigated exclusively in federal court. *See Dabit*, 547 U.S. at 82.

From inception to enactment, Congress intended that SLUSA would make federal court the exclusive forum for securities class actions and eliminate securities class action litigation in state courts. Indeed, both houses of Congress,[4] as well as President Clinton in

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[4] *See, e.g.*, H.R. Rep. No. 105-640, at 8–9, 10 ("The purpose of this title is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court," and that "[t]he solution to this problem is to make Federal court the exclusive venue for securities fraud class action litigation."); S. Rep. No. 105-182, at 3 (1998) (noting the "disturbing trend . . . [of] a noticeable shift in class action litigation from federal to state courts . . . [and] the dangers of maintaining differing federal and state standards of liability for nationally-traded securities"); *The Securities Litigation Uniform Standards Act of 1997: Hearing on H.R. 1689 Before the Subcomm. on Fin. and Hazardous Materials of the H. Comm. on Commerce*, 105th Cong. 1 (May 19, 1998) (statement of Rep. Tom Bliley, Comm. Chairman) ("[SLUSA]

his signing statement,[5] repeatedly expressed the goal of ensuring that securities class actions be pursued only in federal court. *See generally* Brief for Petitioners at 20–31, *Cyan v. Beaver Cty. Emp. Ret. Fund*, No. 15-1439. The Conference Committee report on SLUSA succinctly captured this unequivocal intent: "[t]he solution to this problem [of plaintiffs attempting to circumvent the Reform Act] is to make Federal court the exclusive venue for most securities fraud class action litigation involving nationally traded securities."[6]

D. State Court Jurisdiction over 1933 Act Class Actions Cannot Be Squared with SLUSA's Purpose

Viewed against this legislative backdrop, there is only one faithful reading of SLUSA's amendments to the text of the 1933 Act's jurisdictional provision: the interpretation advanced by petitioners. A contrary interpretation—that Congress intended to carve out a species of securities class actions *alleging federal claims* from the reach of a comprehensive remedial statutory framework specifically constructed to normalize (and federalize) securities class action litigation—would undermine SLUSA's purpose. This Court should not adopt such an interpretation. *See King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (noting

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makes Federal court the exclusive venue for securities class actions.")

[5] President William J. Clinton, Statement on Signing the Securities Litigation Uniform Standards Act of 1998, 34 Weekly Comp. Pres. Doc. 2247, 2248 (Nov. 3, 1998) ("[T]he uniform standards provided by this legislation state that class actions generally can be brought only in Federal court, where they will be governed by Federal law.").

[6] H.R. Conf. Rep. No. 105-803, at 15 (1998).

that "[i]f at all possible, [the Court] must interpret the [statute] in a way that is consistent" with the goals of the legislation).

Congress's grant of concurrent state and federal jurisdiction in the original 1933 Act does not suggest that Congress ever intended for securities class actions to proceed in state court. In fact, it did not. Concurrent jurisdiction was desirable when the 1933 Act was enacted so Congress could ensure that smaller, localized cases could continue to proceed in state court—as they had previously under state blue sky laws—while enabling larger cases involving the interstate sale of securities or foreign bonds—which state blue sky laws had difficulty reaching—to be filed in federal court, pursuant to a uniform federal legislative scheme. *See, e.g.*, Thomas Lee Hazen, *Allocation of Jurisdiction Between the State and Federal Courts for Private Remedies Under the Federal Securities Laws*, 60 N.C. L. Rev. 707, 710–11 (1982); 1 Louis Loss, Joel Seligman & Troy Paredes, Securities Regulation Ch. 1.B.6, 1.G–1.G.1 (5th ed. 2015); Elisabeth Keller & Gregory A. Gehlmann, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 Ohio St. L.J. 329, 336 (1988) ("The minimal impact of the blue sky laws and the failure of the states to adopt uniform laws clearly led to a demand for federal legislation."). At the time, forum shopping concerns like those at issue today did not apply. The Rules Enabling Act had not yet been enacted and the Federal Rules of Civil Procedure had yet to be adopted, so federal courts applied the same procedural rules as the states in which they sat. *See* Charles E. Clark, *The Challenge of a New Federal Procedure*, 20 Cornell L.Q. 443, 446 (1935).

Further, the class action mechanism was entirely unknown in 1933. It was not until the advent of the "modern class action" as a result of the 1966 revisions to Federal Rule of Civil Procedure 23, *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1999), that representative litigation became the model for private plaintiffs to enforce the securities laws. It was as a result of this development, and its subsequent abuse, that targeted federal legislation like the Reform Act and SLUSA became necessary. *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) ("That there is a potential for misuse of the class action mechanism is obvious."). As discussed in detail above, Congress passed the Reform Act and SLUSA as a remedy to the class action problem—a problem that was nonexistent at the time of the 1933 Act. Standard canons of statutory construction dictate that SLUSA's specific mandate regarding class action jurisdiction controls over the more general terms of the 1933 Act's jurisdictional grant. *United States v. Estate of Romani*, 523 U.S. 517, 532 (1998) (holding that a "later," "more specific," and more "comprehensive" statute controls).

II. State Courts Do Not Consistently Offer the Substantive and Procedural Protections Afforded to Securities Class Action Litigation in Federal Court

Permitting state courts to exercise jurisdiction over 1933 Act class actions negatively impacts litigants and the fairness and efficiency of 1933 Act class action proceedings. Uniform federal law—including not only the Reform Act, but also the Multidistrict Litigation Act of 1968 and federal procedural rules governing class actions and discovery—provides federal courts with the tools to adjudicate securities class actions efficiently while protecting defendants and absent

class members from meritless claims and abusive tactics. These provisions do not apply or are not uniformly enforced in state courts. Differences among the states, moreover, when coupled with expansive venue provisions for securities class actions, invite plaintiffs to engage in forum shopping.

A. The Reform Act

Defendants in state fora often lack access to the Reform Act's procedural protections, which are applied unevenly at best in state courts.

First, state courts do not consistently apply the Reform Act discovery stay, which provides that "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss[.]" 15 U.S.C. § 77z-1(b)(1), *accord id.* § 77z-2(f). As detailed in Part III.B, *infra*, discovery is burdensome, intrusive, and generally the most expensive part of civil litigation. When discovery is not properly curtailed, it can pervert incentives for efficient litigation. *See Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 849 (7th Cir. 2010) (Posner, J.) ("One purpose of discovery—improper and rarely acknowledged but pervasive—is it makes one's opponent spend money." (quotation marks, citation, and subsequent history omitted)).

Although some state courts have applied the Reform Act discovery stay, others have not, exposing defendants to the very costs Congress intended to avoid. *Compare* Notice of Order Denying Motion to Stay Proceedings at 7, *Buelow v. Alibaba Grp.*, No. CIV-535692 (Cal. Super. Apr. 1, 2015), Dkt. No. 463 ("[T]he Court finds that a stay of discovery is not warranted. Defendant argues a stay of discovery is automatic under the [Reform Act]. However, Defendant fails to cite a single reported decision in California that the

[Reform Act]'s discovery stay applies to securities class actions filed in state court."), *with Milano v. Auhll*, No. SB 213 476, 1996 WL 33398997, at *3 (Cal. Super. Oct. 2, 1996) ("[T]he motions of the defendants for stays of all discovery [under the Reform Act] must be and hereby are granted as prayed.").[7] Without the discovery stay, defendants face the dilemma of settling even frivolous lawsuits or suffering the considerable burden and expense of discovery while motions to dismiss remain pending.

Second, the Reform Act instructs federal district courts to appoint lead plaintiffs that the court "determines to be most capable of adequately representing the interests of class members." 15 U.S.C. § 77z-1(a)(3)(B). This provision ensures that the plaintiff litigating on behalf of the class—often a public pension fund—has the largest economic interest in the controversy and competent representation. *See* Michael Perino, *Institutional Activism Through Litigation: An Empirical Analysis of Public Pension Fund Participation in Securities Class Actions*, 9 J. Empirical Legal Stud. 368, 390 (2012) ("[P]ublic pension fund participation as lead plaintiffs in securities class actions appears to achieve many of the benefits that . . . Congress anticipated"). State laws typically contain no such protection, which generates a race to the courthouse to reward the first-in-time filer—precisely what Congress sought to avoid in passing the Reform Act. *See* Hon. Leo E. Strine, Jr. *et al.*, *Putting*

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[7] *See also* Benjamin P. Edwards, *Disaggregated Classes*, 9 Va. L. & Bus. Rev. 305, 356–57 (2015) ("[T]he [Reform Act]'s discovery stay does not apply in state court actions . . . ."); Michael Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 Stan. L. Rev. 273, 296–97 (1998) ("State courts . . . generally have been reluctant to stay discovery.").

Stockholders First, Not the First-Filed Complaint, 69 Bus. Law. 1, 49–50 (2013) ("As representative litigation grew more common during the twentieth century, the first-filed rule also became widely invoked in determining priority *between representative plaintiffs*." (emphasis in original)). To the extent that state courts choose lead plaintiffs rather than deferring to the first-filed complaint, the appointment of a lead plaintiff often falls to the discretion of the trial court, or at the very least to less precise standards than those set forth in the Reform Act.[8]

Third, the Reform Act targets professional plaintiffs by restricting the number of times a litigant may serve as lead plaintiff to five actions in any three-year period. 15 U.S.C. § 77z-1(a)(3)(B)(vi). No state has an analogous statute, and indeed the problem of serial plaintiffs (and serial counsel) in state court class actions is well documented. H.R. Conf. Rep. No. 104-369, at 31; *see generally* Jessica Erickson, *The New Professional Plaintiffs in Shareholder Litigation*, 65 Fla. L. Rev. 1089 (2013) (describing migration of professional plaintiffs from securities class actions to other types of class actions to avoid the Reform Act). State courts are similarly unbound by the Reform Act's requirement that federal plaintiffs certify their securities transactions and their suitability to lead the class under penalty of sanction, 15 U.S.C. § 77z-1(a)(2), or its prohibition on class representatives

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[8] *E.g.*, *Robinson v. EMI Music Distribution, Inc.*, No. CIV. A. L-10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996) (selecting lead plaintiff without reference to a legal standard); *In re Kinder Morgan, Inc. Shareholders Litig.*, No. 06 C 801, 2006 WL 2271243, at *2 (Kan. Dist. Ct. Aug. 1, 2006) (selecting lead plaintiff based on counsel's reputation without reference to a legal standard).

receiving bounty payments beyond their pro rata shares of any judgment, 15 U.S.C. § 77z-1(a)(4).

Finally, the Reform Act forces courts to act as a bulwark against abusive class action litigation practices by attorneys through mandatory consideration of Rule 11 at the conclusion of the case. 15 U.S.C. § 77z-1(c). Few (if any) states have enacted similar mandatory provisions.[9]

B. The Multidistrict Litigation Act of 1968

As Congress recognized in enacting SLUSA, parallel litigation in multiple jurisdictions "increase[s] the overall cost of litigation." H.R. Conf. Rep. No. 105-803, at 14. State court defendants, however, lack access to the federal Multidistrict Litigation ("MDL") Act of 1968, which created the Judicial Panel on Multidistrict Litigation to oversee the transfer of similar class (and other) actions filed in multiple districts to a single court for coordinated pretrial proceedings. *See* 28 U.S.C. § 1407.

By their nature, securities class actions pending in multiple federal districts are considered prime candidates for centralization through the MDL process. Emery G. Lee III, *et al.*, *Multidistrict Centralization: An Empirical Study*, 12 J. Empirical Legal Stud. 211, 230 (2015) ("Proceedings in which class allegations are raised are substantially more likely to see a motion for transfer granted."). In cases of overlapping complaints in multiple fora, transfer by the Judicial Panel on Multidistrict Litigation is crucial because parallel (and duplicative) litigation increases the burden for a

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[9] *But see* Tex. Ins. Code Ann. § 541.253 (encouraging courts' diligence in sanctioning litigants in connection with class action abuses)

defendant by multiplying defense costs, multiplying the burdens of discovery, and creating the problem of inconsistent rulings with preclusive effects. Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. Rev. 461, 470–98 (2000) (cataloguing problems with parallel class actions, including "pressure to settle," "informational deficiencies," "waste of resources," and "preclusion problems"); H.R. Rep. No. 105-640, at 10 (noting that after the passage of the Reform Act "there has also been an increase in parallel litigation between state and federal courts in an apparent effort to avoid the federal discovery stay or other provisions of the Act" and that the increase "has the potential not only to undermine the intent of the Act, but to increase the overall cost of litigation to the extent that the Act encourages the filing of parallel claims" (citation omitted)).

There is no interstate equivalent to the federal MDL Act. Without any effective means to centralize parallel interstate class actions, defendants faced with multiple proceedings must rely on discretionary stays and common law doctrines such as *forum non conveniens* and the first-filed rule, which, as Chief Justice Leo E. Strine of the Delaware Supreme Court has observed, are "ineffective counterbalances" to multiplicative multi-forum class actions. Strine, 69 Bus. Law. at 41–42. The lack of a state MDL analog harms plaintiffs and absent class members as well. They likewise face the risk of preclusive legal rulings that are inconsistently or unfavorably determined by courts presiding over uncoordinated proceedings in multiple fora. Wasserman, 80 B.U. L. Rev. at 484–87; *see generally* Tobias Barrington Wolf, *Preclusion in Class Action Litigation*, 105 Colum. L. Rev. 717 (2005). Competing plaintiffs' counsel, moreover, may engage in a race to settle quickly without providing adequate

information to the class. *See* Wasserman, 80 B.U. L. Rev. at 478; *see also* Elizabeth Cosenza, *The Persistent Problem of Multi-Forum Shareholder Litigation: A Proposed Statutory Response to Reshuffle the Deck*, 10 Va. L. & Bus. Rev. 413, 418–20 (2016).

C. Federal Rule of Civil Procedure 23(f) Appeals

Litigants in 1933 Act class actions pending in state court often lack access to any meaningful appellate review of erroneous class certification orders. In federal court, Rule of Civil Procedure 23(f) allows for immediate petitions to review interlocutory orders that grant or deny class certification. This provision affords defendants a quick and efficient means to seek relief from the "unwarranted or hydraulic pressure to settle" generated by improper certification of an immense class of securities purchasers, *see Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001), by seeking redress directly from the federal courts of appeals, rather than having to face potentially unnecessary discovery and trial before having any opportunity to appeal. Rule 23(f) likewise protects plaintiffs and absent class members in so-called "death knell" cases where the denial of class certification will "doom[] the suit as a practical matter." *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). Many states do not provide for similar interlocutory appeals at all, and others permit only appeals of certain dispositions or with discretionary leave from the trial court. *See, e.g.*, Ark. R. App. P. Civ. 2 (discretionary appeal of certification orders); Ill. S. Ct. R. 308 (eff. July 1, 2017) (trial court may certify order for interlocutory appeal); *Stetser v. TAP Pharm. Prods., Inc.*, 165 N.C. App. 1, 10–11 (2004) (orders *denying* class certification generally are

immediately appealable as of right under N.C. Gen. Stat. § 7A-27, but orders *granting* class certification are not); *but see* Ala. Code § 6-5-642 (certification orders appealable as of right).

D. Federal Pleading Standards

State court pleading rules can expose defendants in state court 1933 Act class actions to discovery and protracted litigation, while similarly situated defendants in federal court obtain early dismissal of identical claims. Many states have rejected the "facial plausibility" standard that federal courts apply to pleading claims under Rule 8(a), and continue to allow claims to proceed past a motion to dismiss on more threadbare pleadings that would never survive a motion to dismiss in federal court. *Compare, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007) (adopting standard requiring plaintiffs to allege sufficient factual matter to render their claims plausible), *with, e.g., McCurry v. Chevy Chase Bank, FSB*, 233 P.3d 861, 862–63 (Wash. 2010) (*en banc*) (rejecting *Twombly* standard, which is "more difficult to satisfy," and holding that claims may proceed where "it is *possible* that facts could be established to support the allegations in the complaint" (emphasis in original)).

In practice, state pleading rules that sustain complaints with minimal factual content may impose significant costs on defendants in all classes of cases because "it is only by taking care to require allegations that reach the level suggesting [plausibility] that [courts] can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence.'" *Twombly*, 550 U.S. at 559–60 (third alteration in original) (quoting *Dura Pharms.*,

Inc. v. Broudo, 544 U.S. 336, 347 (2005)). This pleading discrepancy is particularly problematic in 1933 Act class actions as 1933 Act claims do not require plaintiffs to plead or prove fraud to state a cause of action. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983). Many 1933 Act complaints explicitly disavow allegations of fraud or otherwise do not "sound in fraud," thereby evading standards under state laws analogous to Federal Rule of Civil Procedure 9(b). *E.g.*, *Fortunato v. Akebia Therapeutics, Inc.*, No. 1584CV02665, 2017 WL 716356, at *10 (Mass. Super. Feb. 21, 2017) ("Since [plaintiff] has alleged only negligent misrepresentation [in his 1933 Act claim] and expressly disclaimed any allegation of intentional or reckless fraud, the heightened pleading standard of [Massachusetts] Rule 9(b) does not apply.").

E. Discovery Limitations Under the Federal Rules of Civil Procedure

Federal procedural rules now limit the scope, amount and duration of discovery; state rules frequently do not.

For example, Federal Rule of Civil Procedure 26(b)(1) was amended in 2015 to specify that discovery must be "proportional to the needs of the case," and the amendment is already having a significant impact in limiting the scope of discovery in federal court.[10] As of June 2017, however, just three states have

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[10] *See, e.g.*, Samantha L. Southall, *Defining Proportionality: Amended Rule 26's First 6 Months*, Law 360 (June 1, 2016), https://www.law360.com/articles/801934/defining-proportionality-amended-rule-26-s-first-6-months; Richmond T. Moore, *Amended Rule 26 Limits Precertification Discovery*, Law360 (Dec. 15, 2015), https://www.law360.com/articles/736148/amended-rule-26-limits- precertification-discovery.

substantially adopted the 2015 amendments, with another four considering new rules in response.[11] This leaves 26 states that continue to follow the old rule of allowing discovery of anything relevant to the subject matter of the case, and another 17 that follow their own rule or have no rules at all regarding electronic discovery—the source of much of the cost and burden of modern discovery.[12]

The federal rules also limit discovery in other ways, including by presumptively limiting the number and length of depositions and the number of interrogatories. *See* Fed. R. Civ. P. 30 (ten seven-hour depositions per side), Fed. R. Civ. P. 33 (25 interrogatories). These presumptive limits contribute to efficiency and often reduce costs.[13] Conversely, many states are much more permissive, and place no presumptive limits on written or deposition discovery.[14]

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[11] *See* 50 States: Civil Procedure Rules in State Court – Part 2, The Ediscovery Blog (June 14, 2017), http://www.theediscoveryblog.com/2017/06/14/50-states-civil-procedure-rules-state-court-part-2/ (surveying state discovery rules in light of the 2015 amendments).

[12] *Id.*

[13] *See* Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. Rev. 517, 521 (1998) (explaining that "experienced lawyers, representing both plaintiffs and defendants, [when] discuss[ing] current discovery practice and its weaknesses, observ[ed] principally that problems of expense centered on the length and cost of depositions and the breadth of document production").

[14] *See, e.g.*, The Foundation of the International Association of Defense Counsel, State Best Practices Survey (2d ed. Dec. 15, 2012) (surveying all 50 states, including, *e.g.*, Alabama (40 interrogatories and no limits on depositions), California (35 interrogatories and no limits on deposition number in cases exceeding $25,000), Delaware (no limits on either), Florida (30

F. Expansive Venue and Personal Jurisdiction Rules for 1933 Act Class Actions Encourage Forum Shopping

Given the differences between and among federal and state court rules—including on discovery, the selection of class representatives and pleading standards, and other matters, Part II.A–E, *supra*—permitting state courts to exercise jurisdiction over 1933 Act class actions encourages forum shopping. The 1933 Act's broad jurisdiction and venue provisions, which are sometimes (albeit inconsistently) applied in state courts give plaintiffs' attorneys the practical ability to search among available fora for the most permissive jurisdictions in which to file 1933 Act class actions.

1933 Act suits can be brought "in the district where the offer or sale [of the security] took place," 15 U.S.C. § 77v, which potentially permits suit wherever a securities purchaser resides. Because that provision also allows for nationwide service of process, the risk of forum shopping is substantial. That risk is mitigated in federal courts which, unlike state courts, uniformly apply the Reform Act's heightened pleading standards and the facial plausibility test under Rule 8(a), and have the means—through the MDL statute or the federal transfer of venue statutes, *see* 28 U.S.C. §§ 1404, 1407—to move a lawsuit to the most appropriate forum. *See* Part II.A–E *supra*. Some states, however, have imported the 1933 Act's nationwide service of process provision wholesale, meaning that an issuer and its officers and directors can be haled into court

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interrogatories and no limits on depositions), Nebraska (50 interrogatories and no limits on depositions), North Dakota (no limits on either), South Dakota (no limits on either), and Vermont (no limits on either)).

there, no matter how little connection they have to the state. *See Lakewood Bank & Trust Co. v. Superior Ct.*, 129 Cal. App. 3d 463, 470–71 (1982) ("[A] California court may obtain jurisdiction over [the out-of-state defendant] if it can be shown that a claim against [the defendant] is either brought to enforce any liability or duty created by the Securities Act of 1933 or is fundamentally derived from and dependent on such claim.").[15] As a result, plaintiffs' attorneys can game the 1933 Act's jurisdictional provisions to file class actions in favorable state courts without regard to traditional notions of personal jurisdiction. So long as 1933 Act class actions can continue to be brought in state court, issuers and their officers and directors face a serious risk of having to defend lawsuits in distant jurisdictions with which they have little to no connection, and which apply lax pleading rules and minimal protections for securities defendants.[16]

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[15] Courts in some states have required plaintiffs to establish personal jurisdiction over individual defendants without the 1933 Act's nationwide service provision. *See Kelly v. McKesson HBOC, Inc.*, No. CIV A.99C-09-265WCC, 2002 WL 88939, at *19–20 (Del. Super. Ct. Jan. 17, 2002) (finding that Delaware procedural law applies, and "Plaintiffs cannot rely upon the nationwide service provisions of the Securities Act to obtain jurisdiction over the individual Defendants"). But the lack of uniformity among the states on this question merely invites plaintiffs to file 1933 Act class actions in those jurisdictions that take the most expansive approach to exercising personal jurisdiction over defendants.

[16] *See* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 652–53 (2006) ("We began [our empirical study] by asking what factors affected plaintiff and defendant choice of forum. . . . We found for plaintiff attorneys that expectations about judicial predispositions [in state fora] were related to attorney perceptions of favorable substantive law and favorable discovery rules in the state forum they selected.").

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In sum, if the Court were to permit state courts to exercise jurisdiction over 1933 Act class actions, issuers, officers, and directors would face the prospect of multiple overlapping litigations with limited or inconsistently applied procedural protections. In federal court, a single consolidated class action typically proceeds in a single district—directed there, if necessary, by the Judicial Panel on Multidistrict Litigation—with a single lead plaintiff represented by a single lead counsel selected by the court in the competitive process laid out in the Reform Act. Discovery in federal court is stayed pending a determination on the motion to dismiss; if the motion is denied, discovery—and then each subsequent facet of the litigation process—proceeds in a rational way in a single forum. By contrast, under the ruling of the California courts below, multiple competing claims on behalf of multiple competing and overlapping putative classes could be filed in multiple jurisdictions. Those competing cases would often be litigated by the plaintiffs and plaintiffs' counsel who happened to file their claims in a particular jurisdiction first. Defendants in those competing state court actions would face the prospect of early discovery in multiple jurisdictions before decisions on motions to dismiss, which may be subject to differing procedural standards. This was not—and cannot be—what Congress envisioned in passing SLUSA.

III. U.S. Corporations, Their Officers and Directors, and U.S. Capital Markets Are Harmed by the Prospect of State Court Jurisdiction over 1933 Act Class Actions

Empirical evidence shows that confusion regarding U.S. securities law discourages participation in the U.S. capital markets. In particular, many foreign issuers are deterred from listing on U.S. exchanges because the legal environment is unpredictable, escalating litigation costs often force issuers to settle meritless lawsuits, and overwhelming discovery imposes a tremendous burden on issuers. These concerns are exacerbated by the potential for class action litigation in state court, where the scope of discovery has the potential to be much broader than in federal court.

A. The Uncertainty Regarding the Legal Landscape for Securities Class Actions Discourages Participation in U.S. Capital Markets

The uncertain legal environment deters foreign companies from listing on U.S. exchanges for fear that they will be subject to potentially crippling securities liability. Throughout the 2000s, the United States lost its global share of initial public offerings to European and Asian markets. *See* Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* 12 (2007). When senior executives were interviewed about why they chose to avoid the United States, many focused on the lack of a "fair and predictable legal environment" stateside, which they said contrasted with other markets, such as the United Kingdom. *Id.* at 16. It is not surprising, then, that "U.S. securities class action lawsuits" have been identified "by both academics and policy makers as one of the most important deterrents

to foreign firms listing in the U.S." Amar Gande & Darius P. Miller, *Why Do U.S. Securities Laws Matter to Non-U.S. Firms? Evidence from Private Class-Action Lawsuits* (Oct. 2011) (unpublished manuscript) *available at* http://www.baylor.edu/business/finance/doc.php/229667.pdf. When the threat of expensive and vexatious class action litigation drives firms from U.S. capital markets, it damages the economy more generally; since "liquidity attracts liquidity" and thereby spurs economic growth, there is a "paramount public interest . . . in not deterring foreign issuers from offering or listing securities in the United States." John C. Coffee, Jr., *Fear of the U.S. Market*, National Law Journal, December 6, 2006, p. 13.

Indeed, this precise problem was a key motivator for both the Reform Act and SLUSA. In Reform Act hearings, former SEC Chairman Richard C. Breeden explained that "[b]ased on conversations with potential issuers of securities all over the world, the fear of litigation inhibits foreign firms from participating in the U.S. market[s]."[17] Similarly, in hearings leading to SLUSA's passage, a former SEC Commissioner explained that the then-current structure of securities class actions was counterproductive to the goal of "encouraging national and international securities offerings and listing," and he specifically identified "disparate, and shifting, state litigation procedures" as a main factor intimidating issuers from entering U.S. capital markets. *Securities Litigation Uniform Standards Act of 1998—Conference Report*, 144 Cong. Rec.

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[17] *See Common Sense Legal Reform Act: Hearings on H.R. 10 Before the Subcomm. on Telecommunications and Finance of the H. Comm. on Commerce*, 104th Cong., 1st Sess. 221, 224 (1995) (statement of former SEC Chairman Richard C. Breeden).

S12446 (reciting statement of former SEC Commissioner Steven Waller).

B. The Costs Associated with Litigating Class Actions in State Court Are Potentially More Substantial and Debilitating than Litigating in Federal Court

The costs of litigating class actions are—as the Court has recognized on numerous occasions—substantial and debilitating. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable . . . [and] defendants will be pressured into settling questionable claims."); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008) (stating prospect of "extensive discovery" may enable "plaintiffs with weak claims to extort settlements from innocent companies"); *see also* Part II, *supra*. These problems are magnified when securities class actions are litigated in state court, both because the procedural protections of the Reform Act are applied unevenly and because the scope of discovery may be much broader than in federal court.

Discovery costs are by far the highest costs in litigation. At the time the Reform Act was passed, it was reported that the cost of discovery could often account for eighty percent of total litigation costs,[18] and those

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[18] James Hamilton, Fed. Sec. L. Rep., Private Securities Litigation Reform Act of 1995: Law & Explanation, at 78–79 (1996) (reporting that discovery accounts for approximately eighty percent of defendants' total litigation costs in securities class action lawsuits); Edward Brodsky, *Discovery Abuses: A Shifting Target?; Corporate and Securities Litigation*, 217 N.Y.L.J. 33

costs have continued to increase.[19] These costs are compounded significantly by lost employee hours, interrupted business activities, and increased capital costs, which can "dwarf the expense of attorneys' fees"[20] and have been recognized by the Court as a significant harm associated with securities class actions. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 742–43 (1975) (describing "the threat of extensive discovery and disruption of normal business activities" posed by securities class actions).

These costs are a key reason that defendants in securities class actions face intense pressure to settle. This Court has noted that extensive, class-wide discovery can have an "*in terrorem* increment" forcing settlement. *Id.* at 741. The pressure to settle was an important consideration during the passage of the Reform Act, particularly because the pressure to settle is not commensurate with the underlying merits of the case. *Developments in the Law—The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*, 113 Harv. L. Rev. 1806, 1812 (2000) (noting that meritless suits are "as costly to litigate as legitimate claims"). For officers and directors, settlements are predicated on the amount of directors and officers ("D&O") insurance more than any other factor. *See* Alexander, 43 Stan. L. Rev. at 550. These conclusions

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(1997) (stressing that discovery can often account for eighty percent of a defendant's securities litigation costs).

[19] *E.g.*, Karel Mazanec, *Capping E-Discovery Costs: A Hybrid Solution to E-Discovery Abuse*, 56 Wm. & Mary L. Rev. 631, 639–40 (2014).

[20] A.C. Pritchard, *Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers*, 85 Va. L. Rev. 925, 953 (1999).

led Judge Friendly to note that such cases can lead to "blackmail settlements." Hon. Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973); *see also* James A. Henderson, Jr., Comment, *Settlement Class Actions and the Limits of Adjudication*, 80 Cornell L. Rev. 1014, 1021 (1995) ("[S]ettlement class action agreements more closely resemble the payment of blackmail by a corporation whose very survival is threatened by what might well, if taken to trial, prove to be groundless claims.").

As detailed in Part II, *supra*, the scope of discovery has the potential to be far more extensive in state court than federal court, especially because forum-shopping plaintiffs can look for the state with the lowest standards.[21] It is not surprising, then, that defendants often settle earlier and for larger amounts in state courts like California.[22] If defendants are

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[21] *See* G. Chin Chao, *Securities Class Actions and Due Process*, 1996 Colum. Bus. L. Rev. 547, 550–51 (describing the resulting "race to the bottom" settlement process in state courts); Patrick M. Garry *et al.*, *The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform*, 49 S.D. L. Rev. 275, 276 (2005) (highlighting increase in filings in Jefferson County, Mississippi).

[22] *Compare* Priya Cherian Huskins, *IPO Companies, Section 11 Suits and California State Court*, D&O Notebook: Woodruff-Sawyer & Co. (Apr. 26, 2016), https://wsandco.com/do-notebook/ipo-companies-section-11-suits-california-state-court/ (noting seven recent 1933 Act Section 11 cases settled in California for an average of approximately $8 million), *with* Cornerstone Research, Securities Class Action Settlements: 2016 Review and Analysis 11 fig.10 (2017) (noting a median settlement value of $4 million across state and federal courts for 1933 Act Section 11 cases). *See also* Woodruff-Sawyer & Co., *Databox Year-End Securities Class Action Report* (Feb. 2017), https://wsandco.com/wp-content/uploads/2017/05/CorpEx-DO-DataBoxFlashReport-Q4-2016-SF-021317-wCover.pdf (Section 11 cases in California have "an average time to settlement of 1.6 years as compared to 2.6 years for suits

forced to litigate securities class actions in state court, the problems Congress was trying to prevent when it passed the Reform Act and SLUSA (which the Court has often noted as significant issues) would only be exacerbated.[23]

C. Officers and Directors Are Forced to Waste Time Focusing on Vexatious Litigation to the Detriment of Their Shareholders, Their Employees, and Their Companies

The costs of litigating 1933 Act class actions in state court disproportionately affect directors and officers. Directors and officers are named as defendants in state court class actions asserting claims under Section 11 of the 1933 Act, 15 U.S.C. § 77k(a), with near uniformity. For example, individual officers or directors were defendants in more than 95% of the 1933 Act class actions filed in California state courts that petitioners collected—in 42 of 44 total cases. *See* Petition for Writ of Certiorari, Appendix I, *Cyan v. Beaver Cty. Emp. Ret. Fund*, No. 15-1439.

Directors and officers are also a natural focus of certain types of discovery, such as depositions. This focus directly undermines the ability of officers and directors to perform their duties to shareholders, because they must expend significant time and resources preparing for and traveling to depositions, and being deposed. This problem is particularly acute in state

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filed in federal courts" and an average settlement value of $8.8 million).

[23] *See* Brief of *Amici Curiae* Law Professors in Support of Petition for a Writ of Certiorari at 12–13, *Cyan v. Beaver Cty. Emp. Ret. Fund*, No. 15-1439 (comparing federal and state court outcomes in 1933 Act class actions).

court, not only because of the general lack of limits on depositions, *see* Part II.E, *supra*, but also the fact that Section 11 class actions are filed in state courts for forum shopping reasons that have little consideration for whether a particular defendant has any nexus to a state. For example, in many California state court cases asserting Section 11 claims, neither the company's headquarters nor place of incorporation is in California. *See, e.g.*, Complaint at 4, *Cervantes v. Dickerson*, No. CIV-53768 (Cal. Super. 2015), Dkt. No. 1 (1933 Act class action complaint against Etsy, Inc., a Delaware corporation headquartered in Brooklyn, New York); *Braun v. NRG Yield*, No. BCV-16-100867 (Cal. Super. 2016) (as disclosed in its 2016 Form 10-K, defendant is a Delaware corporation headquartered in Princeton, New Jersey). As a result, directors and officers are often forced to travel far from the company nerve center to defend against vexatious litigation, which inhibits their ability to perform their intended roles. When the costs to companies (and, by extension, their shareholders) from loss of director and officer time and attention are layered on top of the enormous costs of class action discovery, there is overwhelming pressure to settle 1933 Act class actions in diffuse state courts, regardless of the merits of the case.

The disproportionate impact on directors and officers also negatively affects shareholders, consumers, and the economy as a whole. It is axiomatic that securities class actions inflate the cost of D&O insurance and affect companies' bottom lines, and that those costs are inevitably passed on to consumers in the form of higher prices for goods and services.[24] But

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[24] Donald C. Langevoort, *Capping Damages for Open Market Securities Fraud*, 38 Ariz. L. Rev. 639, 648 (1996) ("[N]early all the money paid out as compensation in the form of judgments and

there are less celebrated negative externalities as well. Recent studies have suggested that securities litigation is correlated with significant decreases in capital expenditures and investments in research and development, which are key drivers of economic growth. *See, e.g.*, Matteo Arena & Brandon Julio, *The Effects of Securities Class Action Litigation on Corporate Liquidity and Investment Policy*, 50 J. Fin. & Quantitative Analysis 251, 272-73 (2015); Don M. Autore *et al.*, *The Effect of Securities Litigation on External Financing*, 27 J. Corp. Fin. 231 (2014). Further, as this Court recognized in *Dabit*, litigation risk also dissuades qualified individuals from serving as directors in the first place, thereby depriving companies of top talent and further hindering productivity. *See Dabit*, 547 U.S. at 81 (citing H.R. Conf. Rep. No. 104-369, at 31–32 and noting abusive securities class actions "resulted in extortionate settlements, chilled any discussion of [public companies'] future prospects, and deterred qualified individuals from serving on boards of directors."); *see also* H.R. Rep. No. 104-50(I), at 20 (1995) ("Fear of litigation keeps companies out of the capital markets," and "businesses suffer as auditors and directors decline engagements and board positions.").

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settlements comes, one way or another, from investors themselves.").

CONCLUSION

For the reasons set forth herein, this Court should hold that state courts lack subject matter jurisdiction over covered class actions alleging only 1933 Act claims.

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